No. 80-986

Office-Supreme Court, U.S.
FILED
SEP 8 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE NORTH HAVEN BOARD OF EDUCATION,
Petitioner,

v.

TERREL BELL, *et al.*,
Respondents,

and

THE TRUMBULL BOARD OF EDUCATION,
Petitioner,

v.

UNITED STATES DEPARTMENT OF EDUCATION
and LINDA POTZ,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT LINDA POTZ

BEVERLY J. HODGSON
KOSKOFF, KOSKOFF & BIEDER, P.C.
55 Chapel Street
Bridgeport, CT 06604
(203) 336-4421

Counsel for Respondent
Linda Potz

TABLE OF CONTENTS

PAGE

Table of Authorities 1

Statement of the Case 1

Summary of Argument 5

ARGUMENT 9

I. Section 901 of Title IX of the Education Amendments of 1972 Prohibits Sex Discrimination by the Recipients of Federal Financial Assistance to Educational Programs, Including Sex Discrimination in Employment 9

A. The Validity of Subpart E Depends on Its Reasonable Relation to the Purposes of §§901 and 902 9

B. The Statutory Language of §901 States Broad Coverage of the Activities of Recipients of Federal Funds 11

C. The Regulations Are Consistent With the Application of Title IX to Federally-Assisted "Programs" 18

1. The Language of §901 as a Whole and Judicial Construction of the Title VI Model Belie the Theory That Title IX Was Meant to Apply Narrowly to Funded Programs 18

2. "Program Specificity" Is Limited to Fund Termination 22

3. The 'Pinpoint' Approach Does Not Apply Even to Fund Termination Where There Is a Nexus Between the Discrimination and Funded Programs or Their Student and Faculty Beneficiaries 23

PAGE

4. Application to the Facts of the Potz Complaint Reveals That the Regulations Are Consistent With Congress's Objectives in Enacting Title IX 24

II. The Legislative History of Title IX Confirms That Its Purpose Was to Prohibit Discrimination by Recipients of Federal Funds With No Exemption for Employment Practices 28

A. Pre-Enactment Debate and Resolution of Differences Between the Senate and House Versions by the Conference Committee 28

B. Post-Eenactment Consideration by Congress of Title IX and the HEW Regulations 34

III. The Existence of Other Remedies for Sex Discrimination Against Employees in Federally-Funded Educational Programs in No Way Determines the Scope of §901 or the Validity of Subpart E Regulations 27

IV. Conclusion 42

Table of Cases and Authorities

Cases:

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 38, 41

Ass'n Against Discrimination v. *City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981) 23

Board of Public Instruction of Taylor County, Florida v. *Finch*, 414 F.2d 1068 (5th Cir. 1969) 21, 22, 23

Bob Jones University v. *Johnson*, 396 F. Supp. 597 (D. S.C.), aff'd mem., 529 F.2d 514 (4th Cir. 1975) 15

PAGE

Cannon v. *University of Chicago*, 441 U.S. 677 (1979) 3-4, 9, 10, 15, 16, 20, 21, 33, 34, 39
Carmi v. *Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir.), cert. denied, —— U.S. ——, 101 S. Ct. 249 (1980) 14
Caulfield v. *Board of Education of the City of New York*, 583 F.2d 605 (2d Cir.) appeal after remand, 632 F.2d 999 (2d Cir. 1980) 23, 24, 27
Cort v. *Ash*, 422 U.S. 66 (1975) 10

Daniel v. *Paul*, 395 U.S. 298 (1969) 17
Dougherty County School System v. *Harris*, 622 F.2d 735 (5th Cir. 1980), pet. for cert. filed, Dec. 22, 1980 (49 U.S.L.W. 3495) 12, 18, 23, 24, 30

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 17

Hart v. *County of Alameda*, 485 F. Supp. 66 (N.D. Cal. 1979) 14

Iron Arrow Honor Society v. *Hufstedler*, 499 F. Supp. 496 (S.D. Fla. 1980) 22, 24
Islesboro School Committee v. *Califano*, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979) 11, 12, 16, 24, 29, 33, 34, 37, 38

Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975) 38, 39
Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) 17
Junior College District of St. Louis v. *Califano*, 597 F.2d 119 (8th Cir.), cert. denied, 444 U.S. 972 (1979) 11, 24, 37-38

Lau v. *Nichols*, 414 U.S. 563 (1974) 17, 20, 24
Lorillard v. *Pons*, 434 U.S. 575 (1978) 16-17

PAGE

Montclair v. *Ramsdell*, 107 U.S. 147 (1882) 13
Mourning v. *Family Publications Service, Inc.*, 411 U.S. 356 (1973) 9, 12

North Haven Board of Education v. *Califano*, 19 F.E.P. Cases 1505 (D. Conn. 1979) 3, 4, 25
North Haven Board of Education v. *Bell*, 629 F.2d 773 (2d Cir. 1980) ..... *passim*

Oscar Mayer & Co. v. *Evans*, 441 U.S. 750 (1979) 16-17
Othen v. *Ann Arbor School Board*, 507 F. Supp. 1376 (E.D. Mich. 1981) 18

Romeo Community Schools v. *HEW*, 600 F.2d 581 (6th Cir. 1979), cert. denied, 441 U.S. 972 (1979) 4, 11, 12, 16, 18, 24, 29, 33

Seattle University v. *United States Department of Health Education and Welfare*, 621 F.2d 992 (9th Cir.), cert. granted, —— U.S. ——, 101 S.Ct. 563 (1980) 11, 24, 38
Sibbach v. *Wilson & Co.*, 312 U.S. 1 (1941) 35
Simpson v. *Reynolds Metals Co., Inc.*, 629 F.2d 1126 (7th Cir. 1980) 14

Thorpe v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969) 9
Trafficante v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972) 17
Trageser v. *Libbie Rehabilitation Center*, 590 F.2d 87 (4th Cir.), cert. denied, 442 U.S. 947 (1979) 14
Trumbull Board of Education v. *United States Department of Education and Linda Potz*, Civil No. B80-401 (D. Conn. 1979) 4

Udall v. *Tallman*, 380 U.S. 116 (1965) 17, 42
Unemployment Comm'n v. *Aragon*, 329 U.S. 143 (1946) 42

PAGE

United States v. *Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981) 14

United States v. *City of Chicago*, 395 F. Supp. 329 (N.D. Ill.), aff'd 525 F.2d 695 (7th Cir. 1975) 15

United States v. *El Camino Community College Dist.*, 600 F.2d 1258 (9th Cir. 1979) 15, 21, 22

United States v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), opinion adopted en banc, 380 F.2d 385 (5th Cir. 1967), cert. denied, *Caddo Parish School Board* v. *United States*, 389 U.S. 840 (1967) 14, 21, 22, 23, 24, 27

United States v. *Menasche*, 348 U.S. 528 (1954) 13

Statutes and Regulations:

Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*:

29 U.S.C. §633(b) 16-17

Civil Rights Act of 1870, 42 U.S.C. §1981 39

Civil Rights Act of 1964, Title VI, 42 U.S.C. §2000d *et. seq.*: ..... *passim*

42 U.S.C. §2000d ..... *passim*

42 U.S.C. §2000d-3 13

Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e *et seq.*: ..... *passim*

42 U.S.C. §2000e-5 41

42 U.S.C. §2000e-5(c) 16

Department of Education Organization Act, 20 U.S.C. §3401 *et seq.* (Supp. III) (1979) 26

Education Amendments of 1972, Title IX, 20 U.S.C. §1681 *et seq.*:

20 U.S.C. §1681(a) ..... *passim*

PAGE

20 U.S.C. §1681(a)(1) 13, 19

20 U.S.C. §1681(a)(2) 13, 19

20 U.S.C. §1681(a)(3) 13, 19

20 U.S.C. §1681(a)(4) 13, 19

20 U.S.C. §1681(a)(5) 13, 19

20 U.S.C. §1681(a)(6) 19, 36

20 U.S.C. §1681(a)(7) 36

20 U.S.C. §1681(a)(8) 19,36

20 U.S.C. §1681(a)(9) 19, 36

20 U.S.C. §1682 ..... *passim*

Equal Pay Act of 1963, 29 U.S.C. §206(d) 6, 7, 8, 10, 12, 29, 32, 38, 42

General Education Provisions Act:

20 U.S.C. §1232(d) 34

20 U.S.C. §1232(d)(1) 34, 35, 36

20 U.S.C. §1232(f) 34

Rehabilitation Act of 1973, 29 U.S.C. §794 as amended (Supp. 1978) 13-14

State and Local Fiscal Assistance Act of 1973, 31 U.S.C. §1221 *et seq.*:

31 U.S.C. §1242(a) 15

34 C.F.R. Part 106, Subpart E, §§106.51-106.61 2

45 C.F.R. Part 86, Subpart E, §86.1 36

45 C.F.R. Part 86, Subpart E, §§86.51-86.61 ..... *passim*

40 Fed. Reg. 24128 (1975) 23

46 Fed. Reg. 27397-27398 (1981) 40, 41

PAGE

Legislative History:

Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcom. on Education of the House Comm. on Education and Labor, 91st Cong., 2d Sess. (1970) 20

Hearing on House Concurrent Resolution 330 (Title IX Regulation) Before the Subcomm. on Equal Opportunities of the House Comm. on Education and Labor, 94 Cong., 1st Sess. (1975) 32, 33, 35

Hearings on Sex Discrimination and Sex Stereotyping in Vocational Education Before the Subcom. on Elementary, Secondary and Vocational Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. (1975) 26

H.R. Report No. 92-1085, 92d Cong. 2d Sess. 221 (1972) reprinted in 1972 *U.S. Code Cong. & Admin. News* 2671-2672 32

110 Cong. Rec. (1964)

p. 6544 27

p. 2486 22

p. 5090 27

p. 7059 22

p. 7062 22

p. 7067 ..... 22, 27

p. 7103 27

p. 12689 22

pp. 12714-15 22

117 Con. Rec. (1971)

p. 39252 20

PAGE

pp. 39248-39353 32

p. 39365 33

118 Cong. Rec. (1972)

p. 5802 29

p. 5803 ..... 20, 29

p. 5804 20

p. 5805 20

p. 5806 29

p. 5807 ..... 29, 30

p. 5808 29

p. 5812 32

p.5813 32

pp. 24683-85 34

p. 24684 n.1 34

121 Cong. Rec. (1975)

p.17301 35

pp. 23845-23847 36

122 Cong. Rec. (1976)

p. 28136 36

p. 28144 37

Books and Articles:

R. Dickerson, THE INTERPRETATION AND APPLICATION OF STATUTES (1975) 16

Sands, 2A SUTHERLAND STATUTORY CONSTRUCTION (4th ed. 1973) 16

PAGE

Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370 (1947) 10-11

Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 GEO. L. J. 49 (1976).... 33

Murray, *Economic and Education Inequality Based on Sex: An Overview*, 5 VAL. U. L. REV. 237 (1971) 26

Note, *Eliminating Sex Discrimination in Educational Institutions: Does Title IX Reach Employment?*, 129 U. PENN L. REV. 417 (1980) 4

Scott, *The Half-Eaten Apple: A Look at Sex Discrimination in the University*, reprinted in 1970 House Hearings in Section 805 of H.R. 16098 Before the Special Subcomm, on Education of the House Comm. on Education and Labor, 91st Cong., 2d Sess. (Part 1) 1970 26

Tidball, *Women's Colleges and Women Achievers Revisited*, 5 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 504 (1980) 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-986

THE NORTH HAVEN BOARD OF EDUCATION,

Petitioner,

v.

TERREL BELL, *et al.*,

Respondents,

and

THE TRUMBULL BOARD OF EDUCATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF EDUCATION and LINDA POTZ,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT LINDA POTZ

Statement of the Case

In October 1977, respondent Linda Potz filed a complaint with the United States Department of Health, Education and Welfare (HEW) seeking remedies for sex discrimination by her employer, the Trumbull Board of Education (Board). Potz, the only female guidance counselor in this public school system's two junior high schools, charged

that the practices of the administration at one of the schools to which she was assigned and the circumstances under which her employment was terminated by the Board constituted discrimination in violation of Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (J. App. 36-37).[1]

Acting under regulations authorized by Congress in Section 902 of Title IX,[2] HEW investigated Potz' complaint and issued a determination that the Board had violated Title IX by, *inter alia:*

— requiring Potz to perform secretarial and other duties not required of her male counterparts (J. App. 37);

— "demeaning . . . [her] in the eyes of her co-workers and counselees" (J. App. 38);

— requiring her to falsify a Title IX report showing her services to students and work load (J. App. 38);

— terminating her contract for reasons motivated by her sex (J. App. 38-39).

HEW solicited remedial action which it specified should include reinstatement and back pay for Potz and removal of adverse documents from her personnel file (J. App. 34). The Department did not specify the nature of the "administrative proceedings or . . . other means authorized by law" (J. App. 34) which it would follow were the Board unwilling to comply. HEW's notification at no point specified

---

[1] Page references designated "J. App." refer to the appendix filed jointly by the respondents. "Pet. App." denotes references to the appendix which accompanied the petition for a writ of certiorari.

[2] These regulations, codified since May 9, 1980 at 34 C.F.R. §106.51-106.61, formerly appeared at 45 C.F.R. §86.51-86.61. Subpart E of the regulations applies to employment practices of recipients of federal funds (Pet. App. 8A-19A).

termination of federal funds as the proposed action (J. App. 33-42).

After receiving HEW's adverse determination, the Board sought injunctive and declaratory relief, contending that HEW lacked jurisdiction either to enact regulations or to seek remedies as to the type of discrimination identified by Potz, which it characterized as involving only discrimination in employment (J. App. 26-32). The Board admitted receipt of "substantial" federal funds for such programs as "Project Achieve" and services for handicapped students (J. App. 29-31) but neither stated nor denied that guidance counselors were part of such programs or were paid from federal funds received. Potz sought information concerning the Board's receipt and allocation of federal funds through interrogatories to which the Defendant objected (J. App. 43-44).

Regarding the suit as presenting only the same issues it had decided a month earlier in *North Haven Board of Education* v. *Califano*, 19 F.E.P. Cases 1505 (D. Conn. 1979), (*"North Haven I"*), the district court granted the Board's motion for summary judgment (Pet. App. 76A), granted the relief requested, and denied as moot Potz' motion to compel answers to the interrogatories which would have revealed the nature and use of federal funds received by the Trumbull public school system (J. App. 49). The district court having ruled before the date set for the filing of her brief opposing the Board's motion for summary judgment, Potz filed a motion to set aside the ruling, accompanied by an affidavit pointing out the need for adequate development of the factual record to enable the court to determine the relationship between the discrimination identified by HEW and the consequential discrimination against female students in provision of guidance services. (J. App. 52-53). She also argued that the district court should reconsider its construction of Title IX in light of *Cannon* v. *University of Chicago*, 441

U.S. 677 (1979), (*"Cannon"*), which had been decided after the district court's decision in *North Haven I*. (Pet. App. 79A). *Cannon*, while not concerned with employment, suggested that restrictions not expressed by Congress in Title IX should not be implied by construction.

The district court treated the Trumbull case as involving only issues of employment, rejected any applicability of *Cannon*, and concluded that, despite the broad language of Section 901, Title IX should be construed narrowly as forbidding discrimination only against students and "other direct beneficiaries" of federal educational assistance funds for the reasons stated in *Romeo Community Schools* v. *HEW*, 600 F.2d 581 (6th Cir. 1979). (Pet. App. 77A-93A).

The district court conceded that Potz' case presented a stronger case than *North Haven I* for adopting the theory that discrimination against employees affects students (the "infection theory") but stated "the court does not find that there is a clear nexus between the sexual discrimination against employees and its effect upon students." (Pet. App. 90A-91A). The district court denied Potz' timely-filed motion to set aside the order granting summary judgment to the Plaintiff (Pet. App. 25A), denied her cross motion for summary judgment, *id.*, and left undisturbed its order denying as moot Potz' effort to establish by discovery the nexus between the Board's receipt of federal funds and the guidance services or employment of school personnel (J. App. 49).

The Court of Appeals for the Second Circuit reversed the decisions in both *North Haven I* and *Trumbull Board of Education* v. *United States Department of Education and Linda Potz* (Pet. App. 76A-82A) in a consolidated appeal joined by all defendants. *North Haven Board of Education* v. *Bell*, 629 F.2d 773 (2d Cir. 1980), (*"North Haven II"*) (Pet. App. 20A-48A-2). Concluding that the legislative history of Title IX supported HEW's position that

§ 901 of Title IX applies to discrimination in employment, the Court of Appeals relied on the floor remarks, summaries, and answers to questions of the Senate sponsor of the statute and on the rejection in conference committee of a version approved by the House of Representatives which would have excluded employment from Title IX's coverage.

The Court of Appeals also relied on the rejection in both the Senate and the House of Representatives of proposals to exclude coverage of employment after HEW issued its effectuating regulations. *North Haven II*, 629 F.2d at 783-84, (Pet. App. 43A-44A).

Having upheld the employment regulations in general terms, the Court of Appeals did not reach the ground, proposed as an alternative by Potz, that HEW had authority to issue such regulations because sex discrimination against female employees infects the educational program. *North Haven II*, 629 F.2d at 786, (Pet. App. 48A-2).

Summary of Argument

1. As part of the Education Amendments of 1972, Congress enacted a prohibition against sex discrimination in educational institutions receiving federal financial assistance. Section 901 of Title IX of that statute, 20 U.S.C. § 1681(a), provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." Congress exempted several types of institutions and certain practices of other recipients, but it did not exclude the employment practices of federally assisted educational institutions from the prohibition of § 901. The statute on its face protects employees from being "subjected to discrimination under" such programs.

2. Section 902 of Title IX authorized HEW, as a department empowered to extend federal financial assistance to educational programs, to effectuate the purposes of §901 through administrative regulation of recipients of funds. Monitoring and investigation of sex discrimination are authorized as to all but the specifically exempted activities of covered recipients.

Section 902 identifies two categories of sanctions to be used in achieving compliance: denial or termination of federal funds and "any other means authorized by law." Use of the sanction of termination of federal assistance is limited to those activities of a recipient in which the violation occurs. No such limitation applies if compliance is pursued through other legal remedies. Assistance to all of a recipient's activities may be terminated if the violation creates a discriminatory environment or otherwise infects federally funded activities with discrimination.

Respondent Potz' complaint, more clearly than the complaints at issue in the cases decided outside the Second Circuit, involves employment discrimination which HEW was authorized to remedy as a means of protecting not only Potz but the activities for which it provided funds to her employer. Deference to HEW's expertise in fitting regulations to the objectives of §901 is particularly appropriate in such a context.

3. In addition to §901, Title IX contained proposals to extend the protection of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* and of the Equal Pay Act, 29 U.S.C. §206, to women employed in educational institutions. Neither of these measures conditioned access to a remedy for sex discrimination on the employer's receipt of federal financial assistance.

As to educational programs supported by federal funds, each house of Congress considered proposals meant to insure that public monies would not be spent to support dis-

criminatory practices. The bill passed by the House of Representatives was modeled on Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. Like Title VI, this legislation excluded coverage of employment practices except where a primary objective of the federal assistance was to provide employment.

The Senate, by contrast, never adopted the Title VI exclusion of employment practices when it passed the bill which became Title IX. Its general prohibition against discrimination was, like the House version, patterned on §601 of Title VI; however, the preenactment legislative history of the measure indicates that the Senate meant the broad wording proscribing "discrimination under" a program to cover discrimination in the employment practices of recipients.

In the conference to resolve differences between the House and Senate versions, the House receded from its exclusion of employment practices from the prohibition and remedies of the provisions which became §§901 and 902 of Title IX. Congress's departure from the Title VI model must be given effect, and unexpressed restrictions should not be construed into civil rights legislation.

4. The legislative history of these enactments confirms that the broad wording of §901 was meant to apply to all forms of sex discrimination, including employment discrimination, in federally assisted educational institutions. Sex discrimination in employment was specifically identified as one of the practices prohibited by this portion of the statute by its sponsor, Senator Bayh. In neither the Senate nor the House debates is there any evidence that the amendments of Title VII and the Equal Pay Act were to be the exclusive responses to such discrimination.

5. As authorized by §902 of Title IX, HEW presented for the required Congressional review Title IX regulations including regulation of employment practices. After re-

viewing the department's interpretation of the scope of the statute, Congress made no amendments concerning coverage of employment either to §901 of Title IX or to HEW's regulations, though such amendments were proposed. Proposals to disapprove the regulations failed. Though Congress reacted to some of HEW's interpretations of §901 by enacting more exemptions to that measure, none related to employment practices.

6. The availability of certain remedies for sex discrimination under Title VII and the Equal Pay Act as amended to include employees of educational institutions in no way limits the scope of §901. The statute and its legislative history reveal no grant of exclusive jurisdiction to enforcement agencies other than HEW and no hostility to overlapping and complementary remedies against violators which are recipients of federal funds.

7. Subpart E of HEW's regulations is reasonably related to achievement of the purposes of §901, which are the protection of individual citizens from sex discrimination and the avoidance of use of federal resources to support discriminatory practices.

ARGUMENT

I.

Section 901 of Title IX of the Education Amendments of 1972 Prohibits Sex Discrimination by the Recipients of Federal Financial Assistance to Education Programs, Including Sex Discrimination in Employment.

A. *The Validity of Subpart E Depends on Its Reasonable Relation to the Purposes of §§901 and 902.*

Administrative regulations promulgated under a general authorization by Congress are valid if they are reasonably related to the purposes of the enabling legislation. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973); *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280-281 (1969). The enactment of §§901 and 902 of Title IX was not accompanied by a formal statement of Congressional purpose. Instead, the purpose of these measures is established by the statutory language itself and by the respects in which Congress followed or departed from the text of Title VI of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 252, 42 U.S.C. §2000d (1964), which it used as the model for Title IX.[3] *Cannon*, 441 U.S. at 694-95.

The legislative purpose of §901 is also revealed by contemporaneous Congressional debate and by other legislative history concerning the amendment's enactment.

All of the circuit courts which disapproved regulation of employment practices have asked, in effect, whether it

---

[3] Section 601 of Title VI provides as follows:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

was the intent of Congress that only Title VII and the Equal Pay Act apply to employment practices, not whether such coverage as to recipients of federal funds is reasonably related to the purposes of §901. The distinction between "intent" and "purpose" has been given effect by this Court in *Cannon*, its only decision interpreting Title IX. In that case, the Court applied the four factors of *Cort* v. *Ash*, 422 U.S. 66 (1975), to establish whether §901 is enforceable through private suits as well as by administrative enforcement. To determine whether Congress had an intent to create or deny such a remedy, the Court considered the legislative history of Title IX. *Cannon*, 441 U.S. at 694-703. To determine whether Congress' purpose in enacting §901 would be served by recognition of a private right of action, the Court examined the objectives of Title IX. *Cannon*, 441 U.S. at 703-06.[4] It ruled that those objectives are as follows:

> First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.

Cannon, 441 U.S. at 704.[5] The *intent* of Congress concerning application of a statute to a particular circumstance may be incapable of ascertainment beyond the determination whether that circumstance is expressly exempted. The *purpose* of an enactment is identified by determining the goal of Congress when it undertook the legislation.[6]

---

[4] Note, *Eliminating Sex Discrimination in Educational Institutions: Does Title IX Reach Employment?*, 129 U. PENN. L. REV. 417, 438-39 n. 104-105 (December 1980).

[5] The Court referred to §901 as "Title IX" in *Cannon*. Since that case did not involve any other subsections of Title IX, the objectives identified are those of §§901 and 902.

[6] Professor Archibald Cox has provided an example of the way the intent differs from the purpose of legislation:

> In enacting the Fair Labor Standards Act . . . it was the "purpose" of Congress to raise the standard of living of work-

B. *The Statutory Language of §901 States Broad Coverage of the Activities of Recipients of Federal Funds.*

Section 901 of Title IX, 20 U.S.C. §1681(a), provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Except for the substitution of "sex" for "race," and the specification of *education* programs, this language is identical to the full text of the corresponding prohibition of Title VI, at §601 of the Civil Rights Act of 1964.

The court below held that § 901 applies to employment practices of a recipient of federal funds but that § 902 restricts the use of fund termination as a sanction for violation. *North Haven II, supra.* Four other appellate courts have adjudged prohibition of employment discrimination by federally assisted educational institutions to be beyond the scope of § 901. *Seattle University* v. *United States Department of Health, Education and Welfare,* 621 F.2d 992 (9th Cir.) cert. granted, —— U.S. ——, 101 S. Ct. 563 (1980), (*"Seattle University"*); *Romeo Community Schools* v. *HEW,* 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979), (*"Romeo"*); *Junior College District of St. Louis* v. *Califano,* 597 F.2d 119 (8th Cir.) cert. denied, 444 U.S. 972 (1979), (*"St. Louis"*); *Islesboro School Committee* v. *Califano,* 593 F.2d 424 (1st Cir.) cert. denied, 444 U.S. 972 (1979), (*"Islesboro"*). The court of appeals for the Fifth Circuit has held more narrowly that § 901 applies to em-

---

ers engaged in interstate commerce or in the production of goods for commerce. When it defined production to include "any process or occupation necessary to the production thereof," Congress "intended" . . . to make the act applicable to maintenance workers in the executive offices of interstate producers.

Cox, *Judge Learned Hand and the Interpretation of Statutes,* 60 HARV. L. REV. 370, 371 (1947) (footnote omitted).

ployees paid with federal funds and not to employment discrimination against a recipient's other employees. *Dougherty County School System* v. *Harris*, 622 F.2d 735 (5th Cir. 1980), *pet. for cert. filed*, Dec. 22, 1980 (49 USLW 3495) ("*Dougherty*"). These courts have identified coverage more narrowly than the actual language of the statute compels. Each has construed § 901 as prohibiting discrimination only against "beneficiaries" of federal programs and has, with the exception of *Dougherty*, identified students or recipients of grants in the particular categorical programs assisted by federal funds as the sole beneficiaries.[7]

All six courts of appeals which have considered the validity of Subpart E of HEW's regulations have searched for the intent rather than the purpose of Congress in enacting § 901. This shift from the standard of review stated in, *e.g.*, *Mourning* v. *Family Publications Service, Inc.*, *supra*, appears to be a response to the inclusion of amendments to Title VII of the Civil Rights Act of 1964 and of the Equal Pay Act in the original version of Title IX. As is detailed below, the appellate courts recognized the Congressional purpose of prohibiting sex discrimination against those employed in educational institutions but, except for the Second Circuit, and, to a lesser extent, the Fifth Circuit, they attributed that purpose narrowly to these amendments rather than to Title IX generally. These decisions erroneously constrict the purposes of Title IX with regard to regulation of recipients of federal assistance to education.

Whether their appeal is characterized as a construction of purpose or of intent, *Romeo* and *Islesboro* construe sufficiently the reference of § 901 to "denied the benefits of". They accord no meaning, however, to the phrase "sub-

---

[7] *Islesboro*, 593 F.2d at 426; *Romeo*, 600 F.2d at 582. *St. Louis*, 597 F.2d at 121, and *Seattle University*, 621 F.2d at 992, adopt the reasoning of these decisions.

jected to discrimination under;" and they ignore the use of the phrase "no person" instead of any more limited term, such as "no student." Since all words of a statute are to be given effect and not regarded as insignificant or superfluous, *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1954); *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1882), these courts' under-inclusive interpretation of the statute's purpose is erroneous. Teachers in a public school system are "subjected to discrimination under" a recipient's programs when they are denied equal treatment on the basis of their sex.

Unlike § 601, § 901 as originally enacted included some exceptions to the general prohibition. Congress exempted certain recipients entirely[8] and excluded the admissions policies of other recipient institutions.[9] The Title VI model from which Congress adopted much of the text of Title IX also included, at §604, a provision expressly excluding most employment practices of recipients:

> Section 604. Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

Pub. L. 88-352, 78 Stat. 253, 42 U.S.C. § 2000d-3 (1964).

Congress neither incorporated the wording of § 604 in an analogous section as part of Title IX nor listed employment among the exemptions enumerated in § 901.

The petitioners' invocation of interpretations of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *as amended* (Supp.

---

[8] 20 U.S.C. §1681(a)(3), (4).

[9] 20 U.S.C. §1681(1), (2), (5).

1978),[10] as support for a restrictive reading of § 901 is inapposite. While that statute does indeed contain wording corresponding to § 901, the cited judicial constructions depend on the view that the Rehabilitation Act of 1973, as amended in 1978, adopted the limitations of § 604 by restricting coverage to "[t]he remedies, procedures, *and rights* set forth in Title VI of the Civil Rights Act of 1964. . . ." 29 U.S.C. § 794(a)(2) (emphasis supplied). The cited ruling of the Second Circuit in *United States* v. *Cabrini Medical Center*, 639 F.2d 908, 911 (2d Cir. 1981), like those of the other circuit court opinions cited, is based on this "explicit incorporation of § 604 of Title VI"[11] as the reason for restricting the applicability of § 604 to employment to situations in which the primary objective of the Federal assistance was to provide employment. While this Court has never reviewed the correctness of such an interpretation, it is plain that since § 901 contains no such incorporation, there is no reason to imply any such restriction to its scope.

Judicial interpretations of Title VI at the time Congress passed Title IX recognized coverage of the personnel practices of educational institutions in certain circumstances despite the language of § 604. In *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), opinion adopted en banc, 380 F.2d 385 (5th Cir. 1967), cert. denied, *Caddo Parish School Board* v. *United States*, 389 U.S. 840 (1967), ("*Jefferson County*"), teacher assign-

---

[10] *Simpson* v. *Reynolds Metals Co., Inc.*, 629 F.2d 1126, 1234 n.13 (7th Cir. 1980); *Carmi* v. *Metropolitan St. Louis Sewer District*, 620 F.2d 672, 674 (8th Cir.), cert. denied, —— U.S. ——, 101 S. Ct. 249 (1980); *Trageser* v. *Libbie Rehabilitation Center*, 590 F.2d 87, 88 (4th Cir.) cert. denied, 442 U.S. 947 (1979).

[11] One court, finding no legislative history to support the view that Congress meant the limitations of §604 to apply to Rehabilitation Act claims, has upheld the statute's coverage of a recipient's employment practices. *Hart* v. *County of Alameda*, 485 F. Supp. 66, 72 (N.D. Cal. 1979).

ments in a segregated school system were held to be within the remedial scope of Title VI because of HEW's determination that discriminatory practices infected the provision of services to students (the "infection theory").

HEW's authority under Title VI to investigate all of a recipient's practices, including "information about the composition of the College's work force . . . [and] its recruiting and hiring procedures for academic and other positions . . ." was also upheld in *United States* v. *El Camino Community College Dist.*, 600 F.2d 1258, 1259 (9th Cir. 1979) (*"El Camino"*), despite the exclusion regarding employment practices stated in § 604. Possible impact on the intended beneficiaries of assistance was, as in *Jefferson County, supra*, the basis for upholding HEW's regulations and investigation. The benefits accruing to an educational institution in general from receipt of federal funds for any purpose were identified as a reason for recognizing the application of § 601 to all practices of the institution in *Bob Jones University* v. *Johnson*, 396 F.Supp. 597, 602-603, (D.S.C.) aff'd mem., 529 F.2d 514 (4th Cir. 1975). The court stated that this construction comported with the Congressional purpose underlying Title VI, 396 F.Supp. at 604.[12]

As this Court observed in *Cannon*, 441 U.S. at 697-99, Congress is presumed to have been familiar with judicial constructions of Title VI when it used §601 as a model. Had it viewed these interpretations as erroneous, it could have specifically excluded employment at the time of the original enactment of §901 in 1972 or when it added other exemptions in 1974 and 1976.[13]

---

[12] The wording of Section 122 of Title I of the State and Local Assistance Act of 1973, 31 U.S.C. §1242(a), which is identical in all relevant respects to §901 of Title IX, has likewise been held to protect employees of federally funded programs. *United States v. City of Chicago*, 395 F. Supp. 329 (N.D.Ill.), aff'd 525 F.2d 695 (7th Cir. 1975).

[13] Discussion of the post-enactment amendments of §901 appears at pages 34-37 below.

The courts which have taken a restrictive view of the Congressional purpose in enacting §901 have failed to adopt the approach required by this Court in *Cannon*, 441 U.S. at 689, of deciding questions concerning the scope of Title IX by looking to the statute itself. They have even reversed usual principles of statutory construction[14] by reading the failure to list employment among the exceptions to §901(a) as evidence of a purpose to exempt it. *Islesboro*, 593 F.2d at 426; *Romeo*, 600 F.2d at 584.

The absence from Title IX of an exemption for employment practices analogous to §604 of Title VI is conspicuous. Where Congress has borrowed selectively from other anti-discrimination statutes, judicial construction of statutory language must give effect to departures from as well as adherences to the model.

In interpreting the Age Discrimination in Employment Act, Pub. L. 90-202, 81 Stat. 602, 29 U.S.C. §621 *et seq.* (ADEA) for example, this Court has noted that both the prohibitory language, *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978), and certain of the procedural requirements of the ADEA, *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979), were adopted nearly verbatim from sections of Title VII of the Civil Rights Act of 1964. Despite the similarity of language and despite legislative history indicating that the source of §14(b) of the ADEA, Title 29 U.S.C. §633(b), was §706(c) of Title VII, 42 U.S.C. §2000e-5(c), this Court declined to construe the ADEA as adopting the restrictive provision of 42 U.S.C. §2000e-5(c), which requires an aggrieved person to file with a state anti-discrimination agency before filing with the Equal Employment Opportunity Commission. Instead, the failure of Congress specifically to adopt the limiting language was read

---

[14] R. Dickerson, THE INTERPRETATION AND APPLICATION OF STATUTES, 201-202 (1975) (unless the legislature has imbued a statute with negative implications, courts have power to apply broadly the principles announced by the statute); Sands, 2A SUTHERLAND STATUTORY CONSTRUCTION §53.05 (4th ed. 1973).

as permitting simultaneous filing with both agencies. *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756-757.

The silence of the ADEA concerning the availability of trial by jury in age discrimination cases was likewise resolved contrary to the Title VII model and case law. In *Lorillard* v. *Pons* the selective incorporation of portions of Title VII and omission of other features were construed as evidence of Congress' intent to deviate from Title VII's restrictions.

Section 901 of Title IX is remedial civil rights legislation which should be broadly interpreted in order to effectuate Congress's objectives. See, *e.g.*, *Daniel* v. *Paul*, 395 U.S. 298, 307-308 (1969); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968). The expansive wording of §901 and the absence of any statutory language exempting employees from the prohibition against being "subjected to discrimination under" a federally assisted education program require the conclusion that Congress meant to include coverage of the employment practices of recipients of federal funds.

Moreover, because HEW is an executive department with expertise in educational policy and administration, its contemporaneous judgment as to the regulations necessary to effectuate the purposes announced by the statute's nonrestrictive language is entitled to deference. See, *e.g.*, *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *Udall* v. *Tallman*, 380 U.S. 116 (1965). Deference to HEW's interpretation at the time it promulgated the regulations is particularly appropriate because of that department's role in enforcing Title VI. *Lau* v. *Nichols*, 414 U.S. 563, 571 (1974) (Blackmun, J., concurring in the result).

C. *The Regulations Are Consistent With the Application of Title IX to Federally-Assisted "Programs".*

1. The Language of §901 as a Whole and Judicial Constructions of the Title VI Model Belie the Theory That Title IX Was Meant to Apply Narrowly to Funded Programs.

The court in *Romeo*, 600 F.2d at 584, took the mistaken view that because § 901 prohibits sex discrimination in "education programs and activities", the statute must be narrowly construed as authorizing regulations and remedies only in precise parts of an educational program paid for with federal funds. The Fifth Circuit in *Dougherty*, 622 F.2d at 738, stated that HEW has authority to regulate employment if its efforts are limited to "specific programs that receive federal financial assistance." *Accord, Othen* v. *Ann Arbor School Board*, 507 F. Supp. 1376, 1382 (E.D. Mich. 1981). This view, if accurate, would require federal funding agencies and departments to track federal dollars through each recipient's budget process as a precedent to each investigation and order. It would also encourage inventive bookkeeping by recipients motivated to insulate their federal monies from department investigation but would not serve the Congressional objective of avoiding support of discrimination.

The language of § 901 read as a whole and the legislative objective in enacting Title IX negate this construction.

While the first sentence of § 901 uses the words "education program or activity," Congress used "educational institution" and "education program" interchangeably for purposes of defining areas of exclusion in the subsections which follow this general prohibition. If Title IX applied strictly to programs within institutions, it would not have been necessary to include exemptions for any function or activity of educational institutions which was not of the type for which federal assistance is available. Such functions would simply, by their terms, not fit the definition of

"education program or activity receiving federal financial assistance." If Title IX applied exclusively to federally-assisted programs within institutions, there would have been no need specifically to exempt such activities as social fraternities,[15] father-son banquets,[16] or beauty pageants,[17] which are not the type of pursuits supported by federal grants.

The exemptions stated at subsections 1681(a)(1)-(5) equate "educational institutions" of specified types with the "education programs" referred to in § 901(a) by exempting not just programs within those institutions but, in some cases, particular functions of the institutions, such as admissions,[18] or the entire institution.[19]

The exemption of particular institutions or functions of institutions reflects Congress's plain view that all of the activities of a recipient are otherwise part of its "program." As the Second Circuit observed, *North Haven II*, 629 F.2d at 785, employment practices are no less "program-specific" than admission practices, which are plainly included except where specifically exempted.

Congress's use of the language of § 601 of Title VI rather than, for example, such language as "no recipient of federal financial assistance shall . . ." cannot be read as a rejection of coverage of recipients in favor of coverage only of specific programs. In the House of Representatives, Representative Mink forcefully stated the need to stop supporting institutions which discriminate on the basis of sex:

> Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be

---

[15] 20 U.S.C. §1681(a)(6) (1974).

[16] 20 U.S.C. §1681(a)(8) (1976).

[17] 20 U.S.C. §1681(a)(9) (1976).

[18] 20 U.S.C. §1681(a)(1), (2), (5) (1972).

[19] 20 U.S.C. §1681(a)(3), (4) (1972).

> used for the support of institutions to which we are denied equal access.

117 Cong. Rec. 39252 (1971). The legislative history of Title IX in no way supports the view that Congress was willing to prohibit sex discrimination only in federally-funded activities but not otherwise within institutions receiving federal funds. On the contrary, the impetus for enacting Title IX in 1972 was dismay with broad institutional practices, including, for example, the gross underrepresentation of women on American college faculties.[20]

In *Cannon*, 441 U.S. at 704, this Court identified one objective of §901 as "avoid[ing] the use of federal funds to support discriminatory practices."

In construing the language of §§601 and 602 of Title VI, this Court also equated "program" and "recipient" in *Lau* v. *Nichols, supra*, 414 U.S. at 567-568. That case rested on a determination whether the references in §§601 and 602 to "any program or activity receiving Federal financial assistance" authorized HEW to regulate generally a recipient's services to non-English-speaking students. HEW guidelines conditioning receipt of federal funds on provision of services beyond those supported by such funds were upheld as reasonably related to the purposes of §601, which the Court identified as the prevention of discrimination by recipients. *Lau* v. *Nichols*, 414 U.S. at 569. The Court did not condition its approval of the HEW guidelines disputed therein on a showing of program-specificity.

---

[20] In introducing Title IX in the Senate, Senator Bayh made plain the concern that "sex discrimination reaches into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing and pay scales". 118 Cong. Rec. 5803 (1972). He provided statistics showing that "the rule is that once hired, women do not receive advancement as often as men." 118 Cong. Rec. 5804-05 (1972). See also the report of the 1970 hearings on a proposed precursor to Title IX. *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong. 2d Sess. (1970).

Rather, the Court considered the entire school system as a "program'. Though the language borrowed from §601 of Title VI, which the petitioners identify as "program specific," may have had a narrowing purpose in 1964 when Congress debated and enacted Title VI, by 1972 the meaning of this language had been construed broadly by the Fifth Circuit, which perceived that so-called "pinpoint" regulation would not accomplish Congress's ends where the pinpoints were lost in a background of pervasive discrimination. *Board of Public Instruction of Taylor County* v. *Finch*, 414 F.2d 1068, 1075, 1078 (5th Cir. 1969) ("Taylor County"). In 1969 the "program specific" wording of Sec. 601 had been construed by the Fifth Circuit as permitting investigation of all the practices of a recipient institution to determine whether any discrimination was isolated to an extent that it did not affect funded programs. *Id.* As the Second Circuit correctly noted below, at the time Congress used the §601 language as a model for Title IX, that language had also been construed to permit both investigation and regulation, including fund termination, where discrimination in a recipient's non-funded activities had a sufficient nexus with funded functions. *Jefferson County*, 372 F.2d at 847-61.[21]

Congress is presumed to be aware of intervening judicial constructions of prior statutes when it adopts that language in subsequent legislation. In *Cannon*, 441 U.S. at 696-699, this Court construed Title IX as implying a private cause of action because its model, Title VI, had been so construed by the Fifth Circuit.[22] The same presumption

[21] See also *El Camino*, 600 F.2d at 1260 (Title VI investigatory power, unlike regulatory power, applies to entire institution because "HEW must have substantial latitude in scrutinizing policies and practices of the institution that may have a discriminatory impact on the intended beneficiaries of assistance.")

[22] The impression of some Senators before the passage of Title VI that no private cause of action existed was not seen by this Court as a reason to imply a right of action to enforce Title IX. *Cannon*, 441 U.S. at 714-17.

of familiarity with case law and adoption of judicial construction is appropriate in this context, as Congress could easily have altered the language of §601 if it sought to avoid the interpretations imposed in *Taylor County* and *Jefferson County*.[23] Moreover, as is noted above, Congress's wording of exemptions to § 901(a) indicates recognition of the scope which the language of § 601 had been accorded.

2. "Program Specificity" Is Limited to Fund Termination.

The only point in Title IX at which Congress differentiated between "recipients" and "programs" is in the clause of § 902 defining those situations in which the denial or termination of funds may be used to secure compliance. The first sentence of § 902 plainly empowered HEW to investigate and regulate "by issuing rules, regulations or orders of general applicability . . ." . The so-called "pinpoint" provision occurs only at subsection (1) concerning termination of funds to the particular non-compliant "program or part thereof" of a recipient. No such limitation is stated in subsection (2) of § 902 as to pursuit of compliance "(2) by any other means authorized by law." The limitation stated in subsection (1) would be unnecessary if the general power of a granting department were already so limited in all respects, and § 902 should therefore be construed as Title VI was in *Taylor County* and in *El Camino*, 600 F.2d at 1260, to restrict only HEW's ability to apply the sanction of fund termination, and not as a limitation on its investigatory or other remedial powers.

---

[23] Congressional commentary concerning program-specificity before the enactment of Title VI likewise concerned primarily the availability of fund termination under §602 rather than the scope of §601, 110 Cong. Rec. 2486, 7059, 7062, 7067, 12689, 12714-15 (1964). *Iron Arrow Honor Society* v. *Hufstedler*, 499 F.Supp. 496, 504 (S.D. Fla. 1980) treats "program" and "institution" as interchangeable terms in construing Title IX.

3. The "Pinpoint" Approach Does Not Apply Even to Fund Termination Where There Is a Nexus Between the Discrimination and Funded Programs or Their Student and Faculty Beneficiaries.

Even the Fifth Circuit decision from which the "pinpoint" argument is derived recognized that "if [federal funds] support a program which is infected by a discriminatory environment, then termination of funds is proper." *Taylor County*, 414 F.2d at 1078.[24] The nexus between a recipient's discriminatory practices outside of federally-assisted activities and an effect on the environment of these activities has been recognized as a basis for Title IX coverage of employment by the Second Circuit not only in this action but also in *Caulfield* v. *Board of Education*, 632 F.2d 999, 1005 (2d Cir. 1980), in which the court identified the so-called "infection theory" as the basis for jurisdiction as to a decree redressing sex discrimination in employment.[25] Though the Fifth Circuit in *Dougherty* mingled theories concerning the definition of a "beneficiary" under Title IX with references to program-specificity, it also indicated the validity of regulation of employment through fund termination where there is a nexus between the employment and the federally-assisted program.[26]

An entire school system's eligibility to receive federal funds was the issue in *Jefferson County, supra*, 372 F.2d at 847-848, 883. In that case, the Fifth Circuit recognized that

---

[24] This interpretation was cited by HEW as support for the Title IX regulations. 40 Fed. Reg. 24128 (1975).

[25] The Second Circuit read §604 of Title VI restrictively in *Ass'n Against Discrimination* v. *City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981); however, that case, which concerned personnel practices in a municipal fire department, did not involve the infection theory.

[26] The discussion of this issue in *Dougherty* does not go beyond the most obvious case, sex discrimination against employees whose salaries are paid with federal funds. *Dougherty*, 622 F.2d at 737-738.

the mandate of eliminating discrimination in federally supported programs cannot be achieved if a recipient's discriminatory practices of a type not specific to a particular program have an impact on the environment in which the programs are conducted.

The circuits which have disagreed with the Second Circuit as to HEW's general authority have nevertheless recognized that HEW does have a narrow authority to regulate employment where discrimination in employment has an impact on, or a "nexus with" other aspects of a recipient's programs. *Dougherty*, 622 F.2d at 737-738; *Islesboro*, 593 F.2d at 430; *St. Louis*, 597 F.2d at 121 n.3.[27]

In cases brought under Title VI, the Courts have in effect recognized the expertise of the enforcing agency in concluding that discrimination in one aspect of a recipient's practices affects the rest of the program. *Lau* v. *Nichols*, 414 U.S. 563; *Caulfield* v. *Board of Education of the City of New York*, 583 F.2d 605, 611, aff'd after remand, 632 F.2d at 1005 (2d Cir. 1980); *Jefferson County*, 372 F.2d at 882-886. Departure from this deference in the context of Title IX may proceed from a view that maternity benefits (*Islesboro, Romeo*) and equal pay, (*St. Louis, Seattle University, Dougherty*) the issues in every complaint except Potz's, have an effect so confined to the employee that no nexus can be recognized.

4. Application to the Facts of the Potz Complaint Reveals That the Regulations Are Consistent With Congress's Objectives in Enacting Title IX.

In this case the Second Circuit noted that up to two-thirds of the federal funds received by the North Haven

[27] See also *Iron Arrow Honor Society* v. *Hufstedler*, *supra*, 499 F. Supp. at 502, 504, 506, in which the relationship between a males-only society and its benefits to students was adjudged to create a sufficient nexus to allow administrative prohibition of university assistance to the society.

Board of Education were used to pay teachers' salaries. *North Haven II*, 629 F.2d at 774.[28] Where a very substantial portion of federal funds is used for employment, it is artificial and contrary to the Congressional objective to disregard sex discrimination in personnel policies and practices, especially in the absence of an exemption of these areas.

The nexus between sex discrimination against Potz and sex discrimination affecting students and the school environment in general appears in HEW's letter of findings. (J. App. 33-42). The highly public termination of one of the few women with administrative duties in the town's school system (J. App. 39) presented an entirely different scenario than a differential in pay checks, a generally invisible form of discrimination. The Board's discriminatory treatment of Potz "had a demeaning effect on complainant in the eyes of her co-workers and counselees," (J. App. 38), as did her assignment to secretarial functions, which stereotyped her and diminished her status as a professional (J. App. 37).

Additionally, the school administration retaliated against Potz because of her objection to falsifying a portion of the Board's required Title IX self-evaluation which would have indicated inequalities in the provision of guidance services to female junior high school students (J. App. 38). Potz, the only female guidance counselor at the junior high school level, was sought out by female students to serve as a confidant and adviser in adolescent gender-related problems. As a result, she had a disproportionately heavy counseling load; and female students had less access to a counselor of their own sex than did male students (J. App. 52-53). The school principal's displeasure at the assignment of a wom-

[28] The refusal of the district court to allow Potz discovery as to the nature and use of federal funds that the Board had admitted were "substantial" prevented a similar analysis as to the Trumbull Board of Education. See Statement of the Case, above.

an to the administrative functions of the school (J. App. 39), coupled with Potz' termination even after students and parents had rebutted the precise incidents relied on by the Board as justification (J.A. App. 42), are plainly the kind of negative lesson to female students which constitutes an infection of the learning environment of federally-funded programs.[29]

It should be noted that HEW's order to the Board does not specify use of fund termination as an ultimate remedy (J. App. 34). This "threat" was merely assumed by the Board at the time it applied for injunctive relief (J. App. 30). HEW's successor agency, the Department of Education,[30] may, so far as the record reveals, intend to use less punitive means such as an action for injunctive relief, as

---

[29] HEW's expertise in educational theory and practice must be accorded deference in assessing its order of reinstatement of Potz as a visible means of undoing the damage caused by the unequal and stereotypical treatment to which she had been subjected. The effect of personnel policies on student aspirations is documented in the following social science literature and testimony: Murray, *Economic and Education Inequality Based on Sex: An Overview*, 5 VAL. U.L. REV. 237, 269-70 (1971); Scott, *The Half-Eaten Apple: A Look at Sex Discrimination in the University*, reprinted in 1970 House Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor, 91st Cong., 2d Sess. (Part 1) (1970); Tidball, *Women's Colleges and Women Achievers Revisited*, 5 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 504, 508 (1980); Hearings on Sex Discrimination and Sex Stereotyping in Vocational Education before the Subcomm. on Elementary, Secondary and Vocational Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. (1975) at 2-13 (testimony of Dr. Marilyn Steele) and *id.* at 102-114 (prepared statement of Pamela Ann Ruby).

[30] The functions of HEW under Title IX of the Education Amendments of 1972 were transferred to the Department of Education upon the creation of that department by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677, 678, 20 U.S.C. §§3401-3510 (Supp. III, 1979).

the "other means authorized by law" in § 902 if voluntary compliance is not forthcoming.[31]

In these circumstances, however, the Department is not precluded from using fund termination to secure compliance. Whether or not personnel practices are viewed as a "program" of a recipient which devotes a substantial part of its federal funds to salaries, as the Second Circuit implied, *North Haven II*, 629 F.2d at 785, the nexus between the discriminatory treatment of Potz and discrimination in the environment in which the Board's federal programs operate also qualifies this case as an appropriate context for use of the fund termination sanction for the reasons found in *Jefferson County* and *Caulfield* v. *Board of Education of the City of New York*, 632 F.2d at 1005.

The differences in substance between the Potz complaint and those which provided the factual setting for the deliberations of the other circuits highlight the propriety of the Second Circuit's conclusion and the wisdom of recognizing the funding agency's expertise by allowing it to investigate as broadly as necessary. Disputes as to the proper scope of remedies upon a finding of non-compliance should be left to enforcement proceedings, at which a full factual record is available.

---

[31] The parallel remedy language of Title VI was envisioned by Congress as permitting lawsuits for remedial injunctive relief. See, *e.g.*, 110 Cong. Rec. 7067 (1964) (Sen. Ribicoff):

> "Personally, I think it would be a rare case when funds would actually be cut off. In most cases alternative remedies, principally lawsuits to end discrimination, would be the preferable and more effective remedy."

See also *id.*, at 5090, 6544 (Sen. Humphrey); *id.*, at 7103 (Sen. Javits).

II.

The Legislative History of Title IX Confirms That Its Purpose Was to Prohibit Discrimination by Recipients of Federal Funds With No Exemption for Employment Practices.

A. *Pre-Enactment Debate and Resolution of Differences Between the Senate and House Versions by the Conference Committee.*

The legislative history of Title IX supports the conclusion that protection of employees of recipients of federal assistance to educational programs was part of Congress's purpose in enacting this measure. As is surely usual in Congressional debate, some supporters of the legislation confined their remarks to specific areas of coverage, such as student admissions, without professing to be furnishing either exclusive or complete interpretations of §901. By contrast, when Senator Bayh, the sponsor of the version of the statute passed by the Senate, introduced this amendment,[32] his explanation was presented as a summary of its scope:

> Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs and employment resulting from those programs. . . . More specifically, the heart of this amendment is a provision banning sex discrimination in educational programs receiving federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, *and faculty employment*, with limited exceptions. Enforcement powers include fund termination provisions—and appropriate safeguards—parallel to those found in Title VI

[32] This amendment was designated as Amendment No. 874 and was originally proposed as an additional "Title X" in S-659.

> of the 1964 Civil Rights Act. Other important provisions in the amendment would extend the equal employment opportunities provisions of Title VII of the 1964 Civil Rights Act to educational institutions and extend the Equal Pay for Equal Work Act to include executive, administrative and professional women.

118 Cong. Rec. 5802-5803 (1972) (emphasis supplied). The clarity of Senator Bayh's reference to employment discrimination in connection with federally-funded programs precludes the conclusion of the courts in *Romeo*, 600 F.2d at 585, and in *Isleboro*, 593 F.2d at 428, that he was referring to the amendment proposing expansion of Title VII. Moreover, as Title VII is not restricted to employers which receive federal funds, these courts' interpretation relies on the assumption, rendered unlikely by the structure of his remarks, that Senator Bayh did not have in mind the differences between the approach to recipients of federal funds and amendments applicable to all educational institutions.

Senator Bayh also prepared for the record a written summary of the goals and coverage of the various portions of his 1972 amendment. 118 Cong. Rec. 5806-5808 (1972). In the first part of his summary, titled "A. Prohibition of Sex Discrimination in Federally Funded Education Programs," Senator Bayh described the basic prohibition against sex discrimination, the exclusions, and the enforcement provisions which became §§901 and 902 of Title IX. *Id.* at 5807. Under the heading "B. Prohibition of Education Related Employment Discrimination," he described the amendments of Title VII and the Equal Pay Act to include teachers. While employment discrimination is not referred to in the heading which precedes Senator Bayh's description of the provisions which became §901, the substance of the summary establishes that this basic prohibition was also meant to apply to employment discrimination by recipients:

> This portion of the amendment covers discrimination in all areas where abuse as been mentioned—*employment practices for faculty and administrators,* scholarship aid, admissions, access to programs within the institution such as vocational educational classes, and so forth.

Id. (Emphasis supplied).

This summary confirms that §901, as well as the amendments to Title VII and the Equal Pay Act, applies to employees.[33] It also demonstrates the error of the Fifth Circuit's conclusion in *Dougherty* that §901 relates only to employees within federally funded activities in an institution's educational program. Senator Bayh's enumeration of "access to programs within the institution" as one of the areas covered indicates that discrimination in employment and other practices is prohibited throughout the institution administered by a recipient of federal funds. If §901 applied only to specific federally funded activities, the mention of admissions and employment would similarly have been confined to "programs within an institution," and no distinction would have been necessary as to any of the enumerated areas.

In the floor debate of the Bayh amendment, Senator Pell requested Senator Bayh to clarify the scope of §1001 (a) and (b), the predecessors of §§901(a) and (c) of Title

---

[33] Part "A" of the summary begins with the statement, "[c]entral to my amendment are sections 1001-1005, which would prohibit discrimination on the basis of sex in federally funded education programs." *Id.* at 5807. Since Title VII, to which §1005 proposed amendment, is not limited to federally assisted programs, the focus of Part "A", this reference may reflect confusion with the numbering of the provisions of Title X of the original House bill, H.R. 7248, which included an additional section concerning coverage of recipients of federal funds. Because Part A is identified as the description of the coverage of such recipients and because the amendment of Title VII is discussed in Part B, this reference is correctly interpreted either as a misprinting for "sections 1001-1004" or as an oversight. *North Haven II,* 629 F.2d at 781 n.11.

IX. The responses show clearly that the amendment's sponsor intended employment practices to be covered by §901:

> MR. PELL . . . Sections 1001(a) and (b) include all educational institutions which receive Federal assistance. This includes elementary and secondary schools as well. With regard to private undergraduate colleges, the Senator has excluded from coverage their admissions practices. Does the same exclusion apply to nonpublic institutions at the elementary and secondary level?
>
> MR. BAYH. At the elementary and secondary levels, admissions policies are not covered. As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, *and discrimination in employment within an institution, as a member of a faculty or whatever.*
>
> *In the area of employment, we permit no exceptions.* In the area of services, once a student is accepted within an institution, we permit no exceptions. The Senator from Rhode Island asked about admissions policies of private secondary and primary schools. They would be excepted.
>
> • • •
>
> MR. PELL . . . [D]o I understand the Senator to say that the faculty of private schools would have to reflect a sexual balance?
>
> MR. BAYH. This amendment sets no quotas. It only guarantees equality of opportunity. The Senator from Indiana cannot be sure about the sexual balance in any faculty, but *as far as employment opportunities are concerned, the answer would be "Yes."*
>
> • • •

MR. PELL. Would this apply to a parochial school where they have nuns as *teachers?*

MR. BAYH. No. *There is an explicit exception for education institutions controlled by a religious organization.*

• • •

MR. PELL. Mr. President, I refer to a preparatory school such as Peekskill Military Institute which is at the high school level. Would that school be expected to have *women teachers?*

• • •

MR. BAYH. *All military school are excluded.*

118 Cong. Rec. 5812-13 (1972) (emphasis supplied).

The omission from the Senate version of Title IX of any section parallel to §604 of Title VI created a conflict between this legislation and the version passed by the House in H.R. 7248, which included such a provision as §1004.

The debate in the House did not include any specific discussion of §1004, 117 Cong. Rec. 39248-39353 (1971) and there is no indication of hostility in the House to coverage of employees in institutions receiving federal funds[34] under what is now §901 of Title IX as well as under Title VII and the Equal Pay Act.

When a conference committee met to resolve the differences between the House and Senate versions, the Senate approach prevailed. As the committee explained, H.R. Rep. No. 92-1085, 92d Cong. 2d Sess. 221 (1972), reprinted in 1972 *U.S. Code Cong. & Admin. News* 2671-2672:

---

[34] During hearings concerning HEW's regulations in 1975, Representative Mink reviewed the legislative history of Title X and stated that employment was "indeed covered," Hearings before the Subcommittee on Post Secondary Education of the Committee on Education and Labor, House of Representatives, 94th Congress, 1st Sess., at 164 (1975) ("1975 Subcomm. Hearings").

> (f) In addition, the House amendment, but not the Senate amendment, provided that nothing in the title authorized action by any department or agency with respect to any employment practice of any employer, employment agency or labor organization, except where a primary objective of the Federal financial assistance is to provide employment. The House recedes.

Whether the initial inclusion of §1004 in the House version was "a drafting error" or in some other respect accidental[35] is of no significance. The House version of Title IX was clearly divisible into two parts: (1) those provisions addressing discrimination by recipients of federal funds (§§1001-1006) and (2) those provisions applicable to practices of entities other than such recipients (§§1007-1008). 117 Cong. Rec. 39365 (1971). The fact remains that at the time members of the House voted on the amendment it contained language limiting the scope of §901. It cannot be determined how many votes may have been cast on the assumption that employment practices of recipients of federal funds would not be subject to administrative remedies comparable to Title VI as well as to those applicable under Title VII.

No floor debate in the House supports the contention that the reason for passage of Title IX in 1972 was the difference between H.R. 7248 and previous proposals which would have made inclusion of employment more specific. In *Cannon* the adoption of a revision which dropped a specific reference to a private right of action was not read as

---

[35] This explanation for the initial inclusion of §1004 in H.R. 7248 was adopted by *Islesboro*, 593 F.2d at 428, and *Romeo*, 600 F.2d at 584, citing Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 GEO. L. J. 49 (1976). The author had previously stated her disagreement with the scope of HEW's regulations at Congress's review hearings. 1975 Subcomm. Hearings, at 406-408.

precluding the interpretation that the right existed. *Cannon*, 441 U.S. at 713-16, n.50-52. Because the real degree of importance which the House may have attached to § 1004 is not determinable, the retreat from the limiting language must be taken at face value as an agreement that no such limitation should apply.

B. *Post-Enactment Consideration by Congress of Title IX and the HEW Regulations.*

Congress's consideration of Title IX did not stop with the enactment of the Education Amendments of 1972. One month after Title IX was passed, Senator Bayh entered a summary of the statute into the record. 118 Cong. Rec. 24683-85 (1972). This analysis, which is consistent with Senator Bayh's pre-enactment summaries of the legislation, stated that

> Title VI also specifically excludes *employment* from coverage (except where the primary objective of the federal aid is to provide employment). There is no similar exemption for employment in the sex discrimination provisions relating to federally assisted education programs.

118 Cong. Rec. 24684 n.1 (1972) (emphasis is original).

Pursuant to the authorization stated in § 902 of Title IX, HEW completed formal rulemaking and promulgated regulations to effectuate the prohibition stated in § 901 against sex discrimination by educational institutions which receive federal funds. HEW submitted its final Title IX regulations to both Houses of Congress as required by Section 431(d)(1) of the General Education Provisions Act, ("GEPA") 20 U.S.C. § 1232(d)(1), which was made applicable to Title IX by Section 431(f) of that Act, 20 U.S.C. § 1232(f). This review statute provided that such final regulations would become effective after forty-five days unless

Congress passed a concurrent resolution within that period to keep the regulations from taking effect. The standard for Congressional review was whether "the final regulation is inconsistent with the Act from which it derives its authority." 20 U.S.C. § 1232(d)(1). During the six days of hearings conducted by the House to review the Title IX regulations, 1975 Subcomm. Hearings, *supra*, then-Secretary of Education Weinberger called attention to the inclusion in the regulations of provisions prohibiting sex discrimination in the employment practices of covered recipients of federal aid. *Id.* at 436-438, 465-466. Most witnesses who commented on the coverage of employment supported the inclusion of Subpart E of the regulations. See, *e.g.*, *id.* 154-55 (Statement of Representative Carr); 164 (testimony of Representative Mink); 173 (testimony of Senator Bayh); 329 (statement of Dr. Bernice Sandler, Association of American Colleges). A resolution of disapproval was reported out to the full committee, but the areas to which objection was made did not include the coverage of employment practices. 93 H.R. Con. Res. 330 (94th Cong. 1st Sess. (1975)), reprinted in Hearing on House Concurrent Resolution 330 (Title IX Regulation) before the Subcomm. on Equal Opportunities of the House Comm. on Education and Labor, 94th Cong. 1st. Sess (1975).

In the Senate review, Senator Helms voiced disagreement with the regulations covering employment when he introduced a resolution proposing blanket disapproval of the Title IX regulations. 121 Cong. Rec. 17301 (1975). His resolution did not advance beyond committee.

Neither house of Congress disapproved any part of the Title IX regulations. This failure to act has some significance, *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 14-16 (1941), because the regulations became effective four months before Section 431(d) of the GEPA, 20 U.S.C. § 1232(d)(1), was amended to provide that the failure to adopt a concurrent resolution disapproving a final regulation should not

be construed as approval or as a finding of consistency with its authorizing statute.[36]

Congress's failure to disapprove the employment regulations should be read in the context of other Congressional considerations of Title IX after its enactment. Congress has amended § 901 of Title IX in several respects since 1972 without adding any restrictions on coverage of employment. Both of these amendments took place after Congress was made aware, by the promulgation of proposed regulations and submission to it of the final Title IX regulations, of HEW's intention to regulate employment. Subsection 1681(a)(6) (exemption of social organizations) was added in 1974. Pub. L. No. 93-568, § 3(a), 88 Stat. 1862 (1974), 20 U.S.C. § 1681(a)(6). Subsections 1681(a)(7)-(9) (exemptions of single-sex conferences, activities and beauty pageants) were added in 1976. Pub. L. No. 94-482, Title IV, § 412(a), 90 Stat. 2234 (1976), 20 U.S.C. §§ 1681 (a)(7)-(9). By contrast, attempts to limit the employment coverage of Title IX have not progressed beyond their introduction by individual members of Congress. In 1975 Senator Helms introduced a bill which proposed that Title IX be amended to state that "[n]othing in [Section 901 of Title IX] shall apply to any employees of any educational institution subject to this title." S-2146, 94th Cong., 1st Sess; 121 Cong. Rec. 23845-23847 (1975). A year later, Senator McClure proposed to restrict Section 901 to the "curriculum or graduation requirements of the institutions" receiving federal financial assistance. 122 Cong. Rec. 28136 (1976). In the course of successful opposition to this bill, Sen. Bayh stated:

> The impact of this amendment is enormous—it would exempt those areas of traditional discrimination against women that [were] the reason for the Congres-

[36] The Title IX regulations became effective on July 21, 1975, 45 C.F.R. §86.1. The effective date of the amendment of §431(d)(1) of the GEPA was November 25, 1975.

> sional enactment of Title IX. These areas would include scholarship aid, employment and employment benefits and extracurricular activities such as athletics.

122 Cong. Rec. 28144 (1976).[37]

Opposition to the application of § 901 to employment practices and objections to Subpart E of HEW's regulations were certainly brought to the attention of Congress, which has amended § 901 in other respects when it disagreed with HEW's interpretation of the statute. Under these circumstances, any doubts concerning the purpose of Congress at the time it enacted § 901 in 1972 should be resolved in favor of inclusion of employment.

III.

The Existence of Other Remedies for Sex Discrimination Against Employees in Federally-Funded Educational Programs in No Way Determines the Scope of §901 or the Validity of Subpart E Regulations.

The petitioners urge that the availability of Title VII and Equal Pay Act remedies to redress sex discrimination in employment in federally-assisted programs is a reason for construing § 901 as excluding coverage of employment. Those courts of appeals which have held contrary to the court below subscribe, whether expressly or implicitly, to this erroneous view. The First Circuit is *Islesboro*, 593 F.2d at 428, relied on the observation that the other sections of the House and Senate bills provided for amendment of Title VII and the Equal Pay Act to cover employment discrimination on the basis of sex in educational programs, implying that it was therefore unnecessary to construe § 901 as regulating employment. The courts in *St.*

---

[37] This statement helps negate the theory that Senator Bayh intended only the amendments to Title VII and the Equal Pay Act to apply to employment practices of educational institutions.

Louis, 597 2d at 121, and *Seattle University,* 621 F.2d at 992, merely adopted this reasoning.

At least, these courts have seen the initial inclusion of the proposed amendments of Title VII and the Equal Pay Act in the same bill as reason to regard all legislative comments relating to employment as pertaining to provisions other than § 901.[38] The assumption that Congress had the purpose of restricting regulation of employment discrimination to these amendments of existing statutes is unsupported by the legislative history.

Nothing in the debates of either the Senate or the House of Representatives suggests that Congress meant such statutes to be the exclusive sources of remedy for employment dicrimination by those employers which are recipients of federal funds. Neither the floor debates nor the conference committee report reveals any concern for the possibility of, for example, duplicative investigations or multiple complaints. On the contrary, the amendments of both Title VII and the Equal Pay Act reveal a willingness to employ more than one statutory scheme to address this issue.

As the Second Circuit correctly observed *North Haven II,* 629 F.2d 784, (Pet. App. 46A-47A), overlapping jurisdiction in the area of employment discrimination is well recognized, and exclusive jurisdiction is not implied unless stated. See *Johnson* v. *Railway Express Agency, Inc.,* 421 U.S. 454, 459 (1975); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 48-49 (1974).

Legislative enactments in the area of discrimination have long demonstrated a general intent to accord parallel or overlapping remedies. *Alexander* v. *Gardner-Denver Co.,* 415 U.S. at 47. The differences in remedies and procedures

---

[38] The *Islesboro* court was so committed to its view that coverage of employment "was reserved for the amended Title VII and Equal Pay Act," 593 F.2d at 428, that it discounted Senator Bayh's remarks to the contrary as "the product of imprecision of oral discussion." *Id.*

among statutes prohibiting discrimination constitute valuable choices provided by Congress. *Johnson* v. *Railway Express Agency*, 421 U.S. at 461. The existence of more complete remedies and administrative assistance was seen as a reason for recognizing the application of Title VII to claims also amenable to private causes of action under § 16 of the Civil Rights Act of 1870, 42 U.S.C. § 1981. *Johnson* v. *Railway Express Agency*, 421 U.S. at 460.

As this Court observed in *Cannon*, 441 U.S. at 711, the fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section unless there is evidence that Congress meant to exclude the remedy. The availability of administrative enforcement by HEW to prevent and redress sex discrimination in employment is also confirmed by the elimination of the limiting language of §604 of Title VI.

The grant by Congress in §902 of comprehensive regulatory authority to HEW and other federal agencies providing financial assistance recognized their skill and expertise in analyzing discriminatory conduct which, though most obviously directed at employees, was symptomatic of general discrimination also affecting students. For example, HEW might be expected, in response to a complaint of exclusion of female teachers from a federally-assisted auto mechanics program, to suspect that female students might be discouraged from joining the program. The greater likelihood that adult employees would recognize discrimination—and have the skills and continuity of involvement with the program to report it—would enhance the granting agency's ability to discover and remedy the discrimination against others.

The current proposal by the Department of Education to refer some Title IX employment discrimination com-

plaints to the EEOC[39] confirms this interpretation. The Department of Education would retain investigatory and regulatory jurisdiction over all complaints which involve "systemic discrimination," that is, employment discrimination which is part of pervasive or structural discrimination in a program. It would refer to the EEOC those complaints which involve employment discrimination of the same type routinely handled by the EEOC. This referral scheme would insure the Department of Education of an opportunity to review all complaints of employment discrimination to ascertain whether there may be systemic discrimination in the program from which the complaint originates. The granting agency under this proposal would

---

[39] The proposed procedure is as follows:

§..... 6 Processing of complaints of Employment Discrimination

• • • •

(c) A federal agency may refer a complaint of individual acts of employment discrimination covered by Titles VI or IX and Title VII, the Age Discrimination in Employment Act or the Equal Pay Act, *i.e.*, a joint complaint, to the appropriate EEOC field office. As a general rule, joint complaints of individual acts of employment discrimination should be referred to the EEOC.

(d) Joint complaints of systemic acts of employment discrimination should ordinarily be retained by the federal agency. If the agency refers such a complaint to the EEOC, the EEOC may limit its investigation to allegations which directly affect the charging party.

(e) Where a joint complaint alleges discrimination in employment and in other procedures of a recipient, only the allegations of employment discrimination may be referred to the EEOC under the joint regulation. Allegations of discrimination in activities other than employment shall be handled under the agency's own investigation procedures. The agency and the EEOC shall coordinate the investigation of such "mixed" complaints, including, but not necessarily limited to, the initiation of joint or simultaneous investigations.

46 Fed. Reg. 27397-27398 (1981).

also retain authority to apply sanctions beyond those available to the EEOC, including termination of funds.[40]

The Second Circuit correctly observed that fund termination as authorized by §902 of Title IX is a potent sanction to deter and remedy sex discrimination against employees of federally-funded programs, *North Haven II*, 629 F.2d at 785. The availability of Title VII and the Equal Pay Act to provide direct remedies to an injured employee in no way diminishes the validity of regulations which enable HEW to investigate and identify situations which involve the recipients of federal funds. As to them, this remedy is authorized and appropriate to fulfillment of Congress's purposes in enacting §901.

A Title VII or Equal Pay Act complaint would not usually come to the attention of HEW. The EEOC, which is charged with investigating Title VII complaints, 42 U.S.C. 2000e-5, has jurisdiction to remedy only employment practices, and not any other discriminatory practices which may exist in the same program. It is in this regard that the Second Circuit accurately characterized the sanctions available under Title VII and the Equal Pay Act as "piecemeal," 629 F.2d at 785. As was the case in *Alexander-Gardner Denver*, 415 U.S. at 50, "the relationship between the forums is complementary since consideration of the claim by both forums may promote the policies underlying each."

---

[40] §..... 7

• • • •

(b) If the referring agency determines that the recipient has violated any applicable civil rights provision(s) which the agency has a responsibility to enforce, the agency shall so notify the recipient and determine whether further efforts to obtain voluntary compliance are warranted . . . If the deferring agency determines that further efforts to obtain voluntary compliance are not warranted or if such further efforts fail, the agency shall initiate appropriate enforcement proceedings under its own regulations.

46 Fed. Reg. at 27398 (1981).

The standard for review of administrative regulation is not whether the Congressional purpose may be achieved without them but whether the regulations are reasonably related to that purpose.

As this Court stated in *Udall* v. *Tallman*, 380 U.S. at 16, citing *Unemployment Comm'n.* v. *Aragon*, 329 U.S. 143, 153 (1946):

> [T]o sustain the [enforcing agency's] application of [a] statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.

The amendments of Title VII and the Equal Pay Act do not preclude the separate purpose of avoiding subsidies to institutions which discriminate on the basis of sex in employment practices, especially since there is no evidence of a purpose to create exclusive jurisdiction under these earlier statutes.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Second Circuit should be upheld.

Respectfully submitted,

BEVERLY J. HODGSON
KOSKOFF, KOSKOFF & BIEDER, P.C.
55 Chapel Street
Bridgeport, CT 06604
(203) 336-4421

Counsel for Respondent
Linda Potz

LINDA POTZ

By .....
BEVERLY J. HODGSON